

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*,
Report and Order, GN Docket No. 12-268

Let me start by thanking the Incentive Auction Task Force and all of the Commission staff who worked long hours to get us to this point. I appreciate your incredible efforts to consider the many complex legal and technical challenges posed by this Broadcast Incentive Auction. I took my obligation to dig deeply into the voluminous item before us very seriously, and I am immensely grateful for the numerous briefings provided to me and my staff, some of which went late into the evening.

Unfortunately, I must dissent from the order. Although the bidding restrictions are embedded in the separate Mobile Spectrum Holdings item that the Commission also adopts today, these two orders are inextricably linked. Bifurcating them does not allow me to ignore Congressional intent or my own principles. Establishing a spectrum set-aside for well-capitalized companies is so fundamentally harmful that it taints the entire Incentive Auction process and I genuinely fear the auction may fail as a result. Separately, I have a number of other fundamental concerns about the Incentive Auction structure itself that should have been addressed.

First, I disagree with the item's "final stage rule," which will determine whether the auction can successfully close. In the order, the auction ends once enough revenue is raised to cover the payout to the participating stations, the Commission's administrative expenses, the \$1.75 billion repacking budget for the remaining broadcasters, and any remaining amount that is needed to pay for the First Responder Network Authority (FirstNet). While I strongly support meeting the statutory funding target for FirstNet, I do not believe the Commission has the right to pick and choose which of the Congressional funding priorities it is going to favor. The simple fact is Congress has already allocated the funding expected from a successful Incentive Auction for many purposes. Accordingly, the final stage rule should continue the auction until it has raised as much revenue as it can beyond the payments to effectuate the reallocation of broadcast spectrum to wireless broadband use—with the remaining revenues going to the list of Congress' priorities. Or it should incorporate *all* of the items, including deficit reduction, into the final stage rule. Choosing just one program for guaranteed funding smacks of politics and tarnishes the agency's credibility.

Second, I am concerned about the extent to which the order delegates authority to various bureaus to make important decisions to implement the statute. As I have stated before, such decisions should be voted on at the Commission level. For example, the Media Bureau is given broad authority to determine how the Commission reimburses repacking costs, including how to prioritize allocation of funds if \$1.75 billion does not cover all repacking expenses. The Media Bureau will also decide the specific construction deadlines for individual stations, what service rule waivers will be allowed in lieu of reimbursement of repacking costs, and the priority in which the Commission will consider certain broadcaster requests to change channels following the repacking process. At least, as of now, the Auction Comment and Procedures Public Notices—normally done by the Wireless Telecommunications Bureau—will be considered and voted on by the Commissioners.

Third, although the Commission is adopting rules now, it defers to future rulemakings or public notices specific details about how many of these rules will work. For instance, the Commission acknowledges that it needs additional information on how to set prices for the reverse auction. Further consideration will also occur on the extended round rule, which can be used to continue the auction if the revenue raised to clear a certain spectrum target is close but not quite enough to meet the final stage rule. The item also defers deciding the methodology for preventing adjacent and co-channel interference

between wireless and broadcasting services in impaired markets and determining an aggregate interference cap for broadcasters. Too many important pieces are punted to a later day, especially since the item admits that decisions made today may be “refined” in the future. So, instead of establishing a solid framework with a firm foundation, these may be, at best, temporary decisions.

Fourth, I have serious concerns about the questionable dynamic reserve price mechanism whereby broadcasters could accept the Commission’s offer to cease broadcasting only to have the Commission request to lower that amount afterwards if there is a lack of competition. Although the specifics must be worked out, I worry about establishing a mechanism that could cause more market impairments, thereby lowering auction participation and revenues. We should do all we can to avoid market impairments, except in very extreme circumstances.

Fifth, I am worried that the adoption of a standardized 11 megahertz duplex gap, instead of 6 to 11 megahertz depending on the spectrum clearing target as originally contemplated, was an unnecessary change, not a decision grounded solely on what is technically reasonable to prevent harmful interference. I am a strong proponent of unlicensed services and have backed up my words with actions, but I have very real concerns that the uniform duplex gap is a political solution, potentially exposing the American taxpayers to a significant loss of revenue in any auction except one that clears 84 megahertz of spectrum.

Finally, I will suggest that there are legitimate questions as to whether this item complies with the requirement in the statute to protect the broadcasters who chose not to participate in the auction and their corresponding viewers. The item seems to skid across the line in a couple of instances and I expect a court may find difficulty in supporting the Commission here, notwithstanding any normal deference given. Congress was abundantly clear that it wanted to hold harmless non-participating broadcasters in their ability to serve their over-the-air viewers. I am disappointed to see this directive not sufficiently honored.

Although I respectfully dissent on today’s item, I recognize that this auction is of utmost importance. Americans will benefit from putting the spectrum to its highest valued use, the construction of a public safety network and deficit reduction. I hope to collaborate with my colleagues and the entire Incentive Auction Team going forward to ensure that this auction has the greatest chance at success. A lot of uncertainty remains and many details still need to be finalized, but I am hoping for the best.